THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Petition of Michael K. Addison

No. 2007-0362

STATE'S OBJECTION TO PETITION FOR WRIT OF MANDAMUS

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General and the Hillsborough County Attorney, and respectfully objects to the defendant's petition for writ of mandamus seeking to preclude the State from pursuing the death penalty or requesting the Court delay his trials pending implementation of rules of appellate procedure. In support of this objection, the State says as follows:

I. PROCEDURAL HISTORY

On or about October 16, 2006, Manchester Police Officer Michael Briggs was shot in the head and died from his injuries. The defendant was subsequently arrested and indicted on one charge of Capital Murder for knowingly shooting Ofr. Briggs. Trial in that matter has been scheduled for September 2008.

In addition to the capital murder charge, the defendant has a number of other felony charges pending trial in Hillsborough County Superior Court, northern and southern districts. The defendant is scheduled for trial in Hillsborough-North on October 29, 2007, for felon-in-possession of a firearm, reckless conduct, and conspiracy to commit criminal threatening in connection with a shooting at Edward J. Roy Drive in Manchester on October 15, 2006. He is also scheduled for trial in Hillsborough-South on December 10, 2007, for armed robbery and conspiracy to commit robbery for a robbery that occurred on October 11, 2006, at a 7-Eleven convenience store in Hudson. The defendant is also scheduled for trial in Hillsborough-North on

February 19, 2008, for felon-in-possession and armed robbery for a robbery that occurred on October 10, 2006 at El Mexicano restaurant in Manchester.[1]

On May 30, 2007, the defendant filed a petition for writ of mandamus with this Court seeking to bar the State from seeking the death penalty. In the alternate, the defendant seeks an injunction to delay both the murder and non-murder trials. The defendant asserts that he should not be tried on any of the charges because this Court has not adopted special rules of appellate procedure for capital murder appeals. For the reasons discussed below, the defendant's petition for writ of mandamus is without merit and should be denied.

II. STANDARD OF REVIEW

"Mandamus is an extraordinary writ that should be restricted to the amelioration of exigent circumstances, the correction of a plain legal error by the government." State Employees Ass'n v. Lang, 119 N.H. 637, 638 (1979) (quotation omitted). Mandamus will be "granted only when the plaintiff has a clear and apparent right to relief." Mitchell v. Sullivan County Superior Court, 116 N.H. 141, 141 (1976). The writ is also limited to situations where "no other remedy will afford full and adequate relief." Guarracino v. Beaudry, 118 N.H. 435, 437 (1978). "'[M]andamus will not lie where the remedy by appeal or error to another administrative board or tribunal has not been exhausted . . . .'" Lang, 119 N.H. at 638 (quoting 55 C.J.S. Mandamus § 22, at 55 (1948)).

> Although a writ of mandamus is the proper remedy for a public officer's refusal to perform a ministerial act, if an official is given discretion to decide how to resolve an issue before him, a mandamus order may require him to address the issue, but it cannot require a particular result. When the official has addressed the issue, mandamus will lie only to vacate the result of action taken arbitrarily or in bad faith.

[1] For purposes of this objection, the felony charges scheduled for trial before the capital murder case will be referred to as the "non-murder trials."

Guy v. Commissioner, N.H. Dep't of Ed., 131 N.H. 742, 747 (1989) (citations and quotations omitted).

III. AS A MATTER OF STATUTORY INTERPRETATION, RSA 630:5, X DOES NOT MANDATE SPECIALIZED RULES OF APPELLATE PROCEDURE

The thrust of the defendant's argument in this petition is that he is entitled to specialized rules of appellate procedure if the jury convicts him of capital murder and sentences him to death. The capital murder statute outlines the issues to be addressed on appeal to this Court following a death sentence. The ordinary rules of appellate procedure govern appeals of a capital murder conviction and sentence. The defendant is not entitled to special rules of appellate procedure. Since the defendant has no clear and apparent right to special appellate rules, there is no basis to preclude the State from seeking the death penalty or delay the trials.

RSA 630:5 sets forth the procedure to follow in capital murder cases. Paragraphs X-XII govern the procedures this Court must apply on appellate review of a death sentence. In particular, paragraph X provides:

> In all cases of capital murder where the death penalty is imposed, the judgment of conviction and the sentence of death shall be subject to automatic review by the supreme court within 60 days after certification by the sentencing court of the entire record unless time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules adopted by said court.

The standard of review for matters of statutory construction is well-settled. "The interpretation of a statute is a question of law, which [the Court] review[s] *de novo*." State v. Shannon, 920 A.2d 1163, 1166 (N.H. 2007). This Court is the final arbiter of the meaning of a statute. State v. Stewart, ___ N.H. ___, 2007 WL 1119900, at 5 (Apr. 17, 2007). "In interpreting a statute, [this Court] first look[s] to the language of the statute itself, and, if

possible, construes that language according to its plain and ordinary meaning. Furthermore, [the Court] interpret[s] statutes in the context of the overall statutory scheme and not in isolation." State v. Looney, 917 A.2d 1258, 1260 (N.H. 2007). In construing a statute, the "starting point is the language of the statute." Stewart, 2007 WL 1119900, at 5. The Court will "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." State v. Drake, 921 A.2d 403, 408 (N.H. 2007).

RSA 630:5, X provides the defendant with an automatic right to appeal if a death sentence is imposed. The statute further provides time frames and the priority for the consideration of such an appeal. The relevant portion of the statute for purposes of this petition reads that the appellate review of a death sentence "shall be heard in accordance with rules adopted by said court." RSA 650:6, X. The defendant contends that this language means that the Court must adopt special rules of appellate procedure for capital murder cases. (Petition at 13). The defendant's interpretation is inconsistent with the plain language of the statute. It requires this Court to read language into the statute that the legislature has not included.

The New Hampshire Supreme Court has adopted detailed rules of appellate procedure governing all aspects of the appellate process. See generally N.H. S. Ct. R. 5, 6, 7, 13-18, 20. To the extent any rules of procedures of the Supreme Court are inconsistent with RSA 650:5, X, that statutory provision supercedes the Supreme Court rules in part by establishing the timing and priority of death penalty appeals. For example, at the time RSA 630:5, X was adopted, the New Hampshire Supreme Court rules provided that the decision to accept any appeal lay in the discretion of the Court. See generally State v. Cooper, 127 N.H. 119 (1985) (discussing in detail the discretionary appeal process codified in Supreme Court Rules 3 and 7). RSA 630:5, X

superceded these rules by guaranteeing a mandatory right of appeal where the defendant was sentenced to death. See Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 573 (1997) (legislature has the authority "to create and allocate jurisdiction within, and among, the courts"). Moreover, paragraph X guarantees that death penalty appeals will take priority over all other cases and will not be simply scheduled in the ordinary course of appellate practice. Furthermore, by mandating that the sentencing court certify "the entire record" for appeal, paragraph X overrides the ordinary rules of appellate procedure, which require an appellant to identify the relevant portions of the record for appeal. See N.H. S. Ct. R.13(2).

RSA 630:5, X, however, otherwise provides that a death penalty appeal "shall be heard in accordance with rules adopted by [the supreme] court." The plain and ordinary reading of this language, in the context of RSA 630:5 as a whole, simply means that a death penalty appeal is otherwise governed by the ordinary rules of appellate procedure adopted by the Supreme Court. In other words, by stating that a death penalty appeal "shall be heard in accordance with rules adopted by [the supreme court]," the Legislature was simply making it clear that paragraph X did not override all rules of appellate procedure. Rather, that language requires that a death penalty appeal be heard in accordance with the rules of appellate procedure adopted by the Supreme Court. Those rules include the form of appellate pleadings, N.H. S. Ct. R. 6, the format, length, and content of briefs, N.H. S. Ct. R. 16, the process for oral argument, N.H. S. Ct. R. 18, the procedure for filing various motions, N.H. S. Ct. R. 21, 21A, 21B, 22, and other rules dictating the orderly administration of the appellate process.

The defendant has cited absolutely no case from New Hampshire or any other jurisdiction which holds that the failure to adopt specific rules of appellate procedure is constitutionally or statutorily mandated. In fact, courts in other jurisdictions have reached the opposite conclusion.

The Indiana Supreme Court has repeatedly rejected the same challenge the defendant makes here. In Games v. State, 535 N.E.2d 530, 537 (Ind.), cert. denied, 493 U.S. 874 (1989), the court construed an Indiana statute which is essentially the same as RSA 630:5, X. Ind. Code Ann. § 35-50-2-9 provided in relevant part: "A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases."[2] The defendant challenged the absence of a procedure affording adequate appellate review. The court held: "We disagree with the contention that legislative intent mandates the promulgation of special rules for the review of death penalty cases. We have repeatedly held that our standard rules of appellate review allow for the requisite meaningful appellate review of death penalty cases." Games, 535 N.E.2d at 537.

In a case where the defendant attempted to rely on appellate procedures from other states to argue that he was entitled to specialized review, the Ohio Supreme Court reached the same conclusion as the Indiana Supreme Court. In State v. Miller, 361 N.E.2d 419, 423 (Ohio 1977), vacated on other grounds 438 U.S. 911 (1978), the defendant argued that "since Ohio has not adopted a specific statutory scheme of review in death penalty cases similar to those found in the states of Georgia and Florida, its appellate review procedure fails to prevent the arbitrary and uneven imposition of the death penalty throughout the state." The Ohio Supreme Court rejected this argument. It observed that "[t]he United States Supreme Court has never mandated a particular form of appellate review in death penalty cases." Id. The Ohio court concluded that a prompt appeal of right in death penalty cases to a court of statewide jurisdiction was sufficient to

[2] A copy of the Indiana statute is attached hereto with historical and statutory notes. Given the length of the case annotations, those have been excluded from the attachment.

ensure the "evenhanded, rational, and consistent imposition of death sentences under law." Id. (quoting Jurek v. Texas, 428 U.S. 262, 726 (1976)).

As in Miller, the defendant here relies on a number of statutes or court rules from other jurisdictions that are quite different from RSA 630:5, X. For example, the defendant argues that the court rules of appellate procedure in some states require the trial court to compile a detailed report for the supreme court. (Petition ¶11, at 20). The defendant has, in fact, attached the reports from Louisiana and Maryland. (Petition at 35-43). Both the Louisiana and Maryland legislatures, however, have enacted specific statutes requiring the supreme court to adopt such specialized rules. See La. Code Crim. Pro. art. 905.9 ("The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."); Md. Code Ann. Crim. L. §§ 2-305, 2-401(e) (authorizing the Maryland Court of Appeals to adopt rules regarding sentencing and review of death penalty cases). Moreover, the majority of "rules" cited by the defendant (Petition at ¶17 at 9-10), are in fact statutory definitions of the scope of the mandatory appeal, similar in many respects to New Hampshire's statute.

The fact that some states cited by the defendant have adopted specific procedures for appellate review of the death penalty by statute, though the majority have not, has no bearing on whether RSA 630:5, X requires this Court to adopt special rules of appellate procedure. Taken as a whole RSA 630:5, X-XII simply outline the issues that this Court must consider on appeal regardless of other issues that the defense counsel may raise. RSA 630:5 does not mandate special rules of appellate procedure beyond the procedures detailed in that section. To interpret the statute in the manner that the defendant asserts would require this Court to add words to the statute that the New Hampshire Legislature did not include. See Drake, 921 A.2d at 408 (this

Court will "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

IV. NEITHER THE STATE OR FEDERAL CONSTITUTION MANDATE SPECIALIZED RULES OF APPELLATE PROCEDURE

The defendant claims that various provisions of the state and federal constitution require particular rules of appellate procedure for death penalty cases. In particular, the defendant cites the constitutional protections found in the due process clause, the right to effective assistance of counsel, and the protection against cruel and unusual punishment. (Petition ¶¶27-36, 14-19). The defendant has cited no case law finding the lack of specialized rules of appellate procedure violates any of these constitutional rights.

In support of both his statutory construction and constitutional arguments, the defendant claims that there are three reasons why he is entitled to specialized rules of appellate procedure despite the plain language of paragraph X. First, he argues RSA 630:5 does not set forth the applicable standard of review or factors the Court will consider in reviewing the death penalty on appeal. (Petition ¶19, at 10). Second, he claims that RSA 630:5 does not mandate the creation of a pre-sentence investigation report or other similar document to guide the court on appeal. (Petition ¶¶20-21, at 11-12). Third, he argues that the statute does not provide sufficient information for the defendant to understand the scope and nature of the Court's proportionality review. (Petition ¶¶22-24, at 12-13). None of these reasons support the need for particularized rules of appellate procedure.

A. RSA 630:5 Does Not Require This Court To Adopt New Standards Of Review.

The defendant first argues that RSA 630:5, X requires special rules of appellate procedure in order to establish guidelines for the issues to be considered and the standards of

review. This argument misses the point because the defendant incorrectly characterizes RSA 630:5. RSA 630:5 does not create any special standards for appellate review. Rather, that statute provides the Court guidance for the issues it must review on appeal. In the ordinary course of appellate practice, this Court will only consider those issues specifically raised in the notice of appeal and briefed by the defendant. See State v. Armstrong, 151 N.H. 686, 688 (2005); State v. Martin, 145 N.H. 313, 315 (2000). In this regard RSA 630:5 overrides this ordinary appellate practice for death penalty cases. RSA 630:5, X creates an automatic, mandatory appeal. In addition to the Court's ordinary authority to review and correct any trial error, the Court also is required to review the death sentence. RSA 630:5, XII. RSA 630:5, XI outlines three issues that the Court must consider on appeal, regardless of other issues raised by the defendant. Thus, RSA 630:5 does not create a right to additional appellate procedures. That provision only guarantees that the Court will review certain issues on appeal.

RSA 630:5, XI clearly outlines the issues the Supreme Court is required to consider on appeal of a death sentence. Paragraph XI(a), for example, provides that the Court shall determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." The guidelines and standards of review are contained in this Court's case law. With respect to the review required by RSA 630:5, XI(a), this type of test is commonly applied by the Court in the ordinary course of its appellate review. See, e.g., State v. Kepple, ___ N.H. ___, 2007 WL 1138188, at 8 (Apr. 18, 2007) (finding no error in failure to object to audiotape because "the tape recording had no capacity to inflame the passions of a reasonable juror"); id. at 9 (finding no error in prosecutor's closing argument because "the prosecuting attorney made a mild appeal to the passions of the jury in [his] opening statement, that might have required a corrective instruction from the Court had it been appropriately

objected to [but that] [t]he prosecutor did not baldly label the Defendant some sort of jungle beast in an inflammatory outburst, however, as the Defendant's memo implies, but instead analogized the Defendant's behavior in a manner that, considering the evidence, the jury could have found apt."); State v. Yates, 152 N.H. 245, 251-52 (2005) (reversing the defendant's conviction because trial court improperly admitted an audiotape that contained "highly and unfairly prejudicial" material, which was "considerably more emotional than the State suggests"); State v. Dowdle, 148 N.H. 345, 348 (2002) (reversing the defendant's conviction based on the prosecutor's closing argument, finding that prosecutors cannot "use arguments calculated to inflame the passions or prejudices of the jury"); State v. Deflorio, 128 N.H. 309, 315 (1985) (applying an equal protection to evaluate whether classification was "reasonable, not arbitrary, having fair and substantial relation to legislative object"); State v. Pliskaner, 128 N.H. 486, 489 (1986) (rejecting defendant's argument that second degree murder sentences "are arbitrary or grossly disproportionate to the crime charged"); Hardy v. State, 122 N.H. 587, 590 (1982) (reviewing administrative board's decision to determine whether its "conclusion was not so lacking in reason as to be arbitrary, unreasonable, or capricious, or to constitute an abuse of discretion.").

RSA 630:5, XI(b) also requires that this Court determine "[w]hether the evidence supports the jury's finding of an aggravating circumstance, as authorized by law." This Court is routinely called upon to review the sufficiency of the evidence. The standard of appellate review for the sufficiency of the evidence in support of a jury's verdict is well-established and often repeated by this Court. See, e.g., State v. Ruff, No. 2006-108, slip op. at 2-3 (N.H. June 8, 2007) (when challenging the sufficiency of the evidence the defendant "carries the burden of proving that no rational trier of fact could have found her guilty beyond a reasonable doubt. We view the

evidence in the light most favorable to the State and examine each evidentiary item in the context of all the evidence, not in isolation. When the evidence presented is circumstantial, it must exclude all rational conclusions except guilt in order to be sufficient to convict.") (citations omitted). Thus, the rules of appellate review in this regard are also not unique to death penalty cases.

B. RSA 630:5 Does Not Require This Court To Adopt Any Particular Procedure For Summarizing The Trial And Sentencing Record.

The defendant also challenges the lack of a pre-sentence investigative report or other similar document to guide the court in conducting its appellate review. The statutory framework provides ample information for this Court to review a death sentence. Prior to trial, the State is required to identify all statutory and non-statutory aggravating factors upon which it intends to rely in the sentencing hearing in order to seek the death penalty. RSA 630:5, I and VII. The jury is required by statute to return "special findings identifying any aggravating factors set forth in paragraph VII, which are found to exist." RSA 630:5, IV. The jury must also return "a special finding identifying any other aggravating factor for which notice has been provided under subparagraph I(b) . . . ." RSA 630:5, IV. The finding of any aggravating factor must be unanimous. Id. The jury may only recommend a death sentence if it unanimously finds beyond a reasonable doubt at least one aggravating factor from VII(a) and one aggravating factor from VII(b). RSA 630:5, IV. The jury must still unanimously agree that the aggravating factors outweigh the mitigators in order to recommend that the death penalty be imposed. Id.

If the jury recommends a sentence of death, RSA 630:5, X requires the sentencing court to transfer "the entire record" for appellate review. This would obviously include transcripts, exhibits, stipulations, and any other evidence, as well as the special verdict forms required by RSA 630:5, IV. The complete record, including the death penalty notice and special verdict

forms, is sufficient to enable the Supreme Court to review the death sentence pursuant to the factors set forth in RSA 630:5, XI. Indeed, unlike an ordinary case where the Court is called upon to review the sufficiency of the evidence, in a capital case the Court has more information about the basis for the jury's verdict. The death penalty notice and special verdict forms provide the Court specific guidance about what facts the jury found beyond a reasonable doubt. See Resnover v. State, 460 N.E.2d 922, 929 (Ind.) (rejecting argument that special rules of appellate procedure were required in death penalty cases because "our review procedure is automatic, expeditious and involves a consideration of the entire record including all written findings and the factual findings required to justify that death is appropriate to the particular offender and offense."), cert. denied, 469 U.S. 873 (1984).

This Court has found that a defendant's due process right to effective appellate review was not violated in other contexts where the defendant has argued for the need for greater statutory clarity. For example, in State v. Abbott, 127 N.H. 444, 448 (1985), the defendant argued that the insanity defense violated his due process rights because the lack of a specific test for insanity meant that the finding of sanity could not be subject to effective appellate review. This Court rejected that argument. The Court reasoned:

> A jury verdict of sanity is not unreviewable; it is always subject to appellate review. As we stated in our discussion of the defendant's challenge to the sufficiency of the evidence, a jury verdict will be overturned on appeal if no rational trier of fact could have come to the same conclusion. The jury may not enter a verdict wholly unsupported by the evidence. Thus, we can conceive of no way in which the defendant's due process rights were violated by the New Hampshire rule on insanity.

Id. at 449 (citation omitted). Thus, RSA 630:5 does not violate the defendant's due process rights because it provides much more guidance to the Court for appellate review than in any other type of case.

C. RSA 630:5 Does Not Require This Court To Adopt Special Rules For Conducting Proportionality Review Of Death Sentences.

The defendant's third complaint is that the statute does not provide sufficient information to guide the defense or the Court when it conducts its proportionality review. This argument is also without merit. In fact, proportionality review is also not unique to death penalty cases in this state. This Court has applied proportionality review in the context of second degree murder cases. In Pliskaner, the defendant argued "that his sentence is harsher than sentences for second degree murder handed out during the past twenty years in New Hampshire." 128 N.H. at 489. The defendant then compiled a list of 58 cases and the sentencing range in each of those cases. Id. The Court reviewed those cases and noted that "the trial court as a whole has recently been sentencing defendants convicted of second degree murder to longer terms, with longer periods needed to be served before a defendant is eligible for parole." Id. Nonetheless, the Court held: "we cannot say that the sentences reflected by this trend are arbitrarily or grossly disproportionate to the crime charged. Nor can we conclude that the minimum sentence and term prior to parole eligibility in this case are grossly disproportionate to those in recent second degree murder convictions." Id. at 489-90. In the past, this Court has even exercised its appellate authority to correct sentences it felt were disproportionate to the crime charged. In State v. Dayutis, 127 N.H. 101, 105-06 (1985), this Court vacated a sentence in a second degree murder case because the penalty imposed was more severe than the punishment imposed for more serious crimes at the time the defendant committed his offense. Thus, proportionality review of sentences on appeal is not foreign to this Court. See also Duquette v. Warden, 919 A.2d 767, 774 (N.H. 2007) (rejecting defendant's argument that consecutive sentences "foster a system of arbitrary and disproportionate sentencing decisions that essentially end run the requirements of existing sentencing statutes."); State v. Hammond, 144 N.H. 401, 408 (1999)

("The defendant also argues that his sentence is greater than sentences imposed for similar crimes in this and other jurisdictions. . . . To demonstrate that the sentence of fifteen to thirty years for manslaughter is excessive, the defendant compiled sentences handed down by the superior court for negligent homicide, manslaughter, and second degree murder cases, as well as newspaper articles about cases from a variety of jurisdictions. There is no requirement, however, that all sentences for a particular crime be identical."); State v. Peabody, 121 N.H. 1075, 1078 (1981) (recognizing that the Court may review sentences to determine if the sentence "might be so disproportionate as to constitute an abuse of discretion"); State v. Farrow, 118 N.H. 296, 303 (1978) ("Measuring the sentence of life imprisonment without parole against the purposes society has in punishing crime, we find nothing per se disproportionate in these sentences for first-degree murder.").

The Indiana Supreme Court rejected the exact argument the defendant has made here. In Resnover, the Court observed that appellate counsel was adequately equipped to bring appropriate cases to the court's attention. 460 N.E.2d at 930. The court noted that an appellate advocate would

> find and direct this Court's attention to all prior cases in Indiana or elsewhere in which death penalties were imposed under similar factual circumstances. Such cases would show this Court that imposition of death in the case under review might be inconsistent, freakish, arbitrary, wanton or unjustified under those particular factual circumstances. Our procedure thereby makes our consideration of any comparable cases inevitable. By the same token, our procedure thereby shows that effective assistance of counsel is not obviated by any dearth of rules since appellate counsel readily can find reported non-capital murder cases to use for argument.

Id.

As noted above, it is clear in this State that defense counsel has been able to present proportionality arguments to challenge a sentence in other contexts despite the lack of specific

rules outlining the process. See Duquette v. Warden, 919 A.2d at 774; Pliskaner, 128 N.H. at 489; Farrow, 118 N.H. at 303.

The United States Supreme Court has specifically held that proportionality review of death sentences is not even constitutionally mandated. See Pulley v. Harris, 465 U.S. 37, 50-51 (1984). The Court noted that its death penalty decisions do not require any particular sort of appellate review. Rather, they focus "only on the provision of some sort of prompt and automatic appellate review" as "a means to promote the evenhanded, rational, and consistent imposition of death sentences." Id. at 49.

In Proffitt v. Florida, 428 U.S. 242, 258 (1976), the defendant attacked "the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable." The Supreme Court noted that the fact that Florida courts have "not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary." Id. The Court held that the fact that the Florida courts have undertaken a de facto proportionality review in the absence of a specific statutory mandate to do so was adequate to ensure that the death penalty was being reviewed appropriately. Id. at 259. In fact, the Supreme Court specifically criticized the type of analysis conducted by the defendant in the present petition for writ of mandamus. The Court observed: "Needless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensable. We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable." Id. at 44-45. In fact, the defendant acknowledges in his petition that several states have no apparent rules to guide the proportionality review. (Petition ¶22, at 12).

The defendant has failed to establish that his rights under either the state or federal constitutions are violated by the lack of specific rules of appellate procedures.[3] Accordingly, this Court must deny the petition for writ of mandamus.

V. EVEN IF RSA 630:5, X REQUIRES SPECIAL RULES OF APPELLATE PROCEDURE, THERE IS NO BASIS TO DELAY THE TRIALS CURRENTLY SCHEDULED

The defendant's petition for writ of mandamus seeks to delay both the capital murder trial and the non-murder trials. For the reasons discussed in detail above, the State does not believe there are any grounds for delaying either the capital murder or the non-murder trials based on a lack of specific rules of appellate procedure for death penalty cases. To the extent that this Court believes that RSA 630:5, X does require specific appellate rules for death penalty cases, that decision should not delay the current trial schedules. The capital murder trial is scheduled to begin in September 2008 – more than one year and two months from now. The trial schedule for the capital murder case, thus, provides abundant time to develop rules of appellate procedure to the extent this Court holds RSA 630:5, X requires such specialized rules. See N.H. S. Ct. R. 51.A(7) (providing authority for Court to override ordinary rule-making process when necessary).

Moreover, if this Court finds that RSA 630:5, X requires specialized rules of appellate procedure for death penalty cases, such a holding has no bearing on the timing of the non-murder trials. The defendant is currently scheduled for trial on the non-murder trials on October 29,

[3] The defendant argues that the State constitution is more protective than the Eighth Amendment to the Federal Constitution. The Court should reject that argument. The defendant has presented no basis for this assertion beyond a generalized observation that, in some other contexts, this Court has occasionally found the State constitution offers greater protection than its federal counterpart. The defendant offers no specific reasons why the State Constitution should be more protective in this context. In the past, this Court has conducted the same analysis under part I, articles 18 and 33 of the N.H. Constitution and the Eighth Amendment to the United States Constitution. See State v. Enderson, 148 N.H. 252, 258 (2002).

2007, December 10, 2007, and February 19, 2008. Those cases should be allowed to proceed on schedule.

RSA 630:5, X is very clear that the provision for an automatic, expedited appeal to the supreme court applies only in "cases of capital murder where the death penalty is imposed . . . ." (Emphasis added). Thus, the special statutory requirements for appeals in death penalty cases does not even apply in all capital murder cases. In other words, if the jury returns a guilty verdict on the charge of capital murder but fails to return a recommendation of a death sentence, the defendant's appeal to the supreme court would proceed in the ordinary course. He would not be entitled to the special treatment allowed by RSA 630:5, X-XII.

Since the special statutory requirements for death penalty appeals do not even apply to all capital murder convictions, it is impossible to understand how those provisions have any bearing on the non-murder trials. If the defendant is convicted of the non-murder charges, those cases would proceed to appeal in the ordinary course. Even if this Court felt the need to adopt special rules of appellate procedure for death penalty cases, those rules would not govern the trial of the non-murder cases here. Thus, there is no basis to stay the non-murder trials. Regardless of this Court's decision with respect to the rules of appellate procedure for death penalty cases, the defendant does not have "a clear and apparent right to relief" with respect to the non-murder cases. Mitchell, 116 N.H. at 141. Accordingly, this Court should deny the petition with respect to those charges even if the Court concludes that rules are necessary for cases involving the death sentence.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

A. Deny the defendant's request to stay all proceedings pending resolution of the issues in this appeal;

B. Deny the defendant's request for an order barring the imposition of the death penalty;

C. Deny the defendant's request to adopt rules governing this Court's appellate review of a death sentence;

D. Deny the petition for writ of mandamus; and

E. Grant such further relief as may be just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been mailed to Richard Guerriero, Esq., David Rothstein, Esq., and Donna Brown, Esq., counsel of record for the defendant; and Suzanne Gorman, Esq., counsel of record for John Safford and Marshall Buttrick, the clerks of Hillsborough County Superior Court,.

June 29, 2007

N. William Delker

ATTACHMENT

Westlaw.

IN ST 35-50-2-9

IC 35-50-2-9

This document has been updated. Use KEYCITE.

West's Annotated Indiana Code Currentness
Title 35. Criminal Law and Procedure
Article 50. Sentences
Chapter 2. Death Sentence and Sentences for Felonies and Habitual Offenders

→35-50-2-9 Death sentence; life imprisonment without parole

Sec. 9. (a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not proceed against a defendant under this section if a court determines at a pretrial hearing under IC 35- 36-9 that the defendant is a mentally retarded individual.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson (IC 35-43-1-1).

(B) Burglary (IC 35-43-2-1).

(C) Child molesting (IC 35-42-4-3).

(D) Criminal deviate conduct (IC 35-42-4-2).

(E) Kidnapping (IC 35-42-3-2).

(F) Rape (IC 35-42-4-1).

(G) Robbery (IC 35-42-5-1).

(H) Carjacking (IC 35-42-5-2).

(I) Criminal gang activity (IC 35-45-9-3).

(J) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either:

(A) the victim was acting in the course of duty; or

(B) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

(A) under the custody of the department of correction;

(B) under the custody of a county sheriff;

(C) on probation after receiving a sentence for the commission of a felony; or

(D) on parole;

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The defendant burned, mutilated, or tortured the victim while the victim was alive.

(12) The victim of the murder was less than twelve (12) years of age.

(13) The victim was a victim of any of the following offenses for which the defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.

(B) Kidnapping (IC 35-42-3-2).

(C) Criminal confinement (IC 35-42-3-3).

(D) A sex crime under IC 35-42-4.

(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.

(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

(A) into an inhabited dwelling; or

(B) from a vehicle.

(16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The court shall instruct the jury concerning the statutory penalties for murder and any other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time credit and clemency. The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt as described in subsection (l) and shall provide a special verdict form for each aggravating circumstance alleged. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) For a defendant sentenced after June 30, 2002, except as provided by IC 35-36-9, if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. The jury may recommend:

(1) the death penalty; or

(2) life imprisonment without parole;

only if it makes the findings described in subsection (l). If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly. After a court pronounces sentence, a representative of the victim's family

and friends may present a statement regarding the impact of the crime on family and friends. The impact statement may be submitted in writing or given orally by the representative. The statement shall be given in the presence of the defendant.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, except as provided by IC 35-36-9, the court shall:

(1) sentence the defendant to death; or

(2) impose a term of life imprisonment without parole;

only if it makes the findings described in subsection (l).

(h) If a court sentences a defendant to death, the court shall order the defendant's execution to be carried out not later than one (1) year and one (1) day after the date the defendant was convicted. The supreme court has exclusive jurisdiction to stay the execution of a death sentence. If the supreme court stays the execution of a death sentence, the supreme court shall order a new date for the defendant's execution.

(i) If a person sentenced to death by a court files a petition for post-conviction relief, the court, not later than ninety (90) days after the date the petition is filed, shall set a date to hold a hearing to consider the petition. If a court does not, within the ninety (90) day period, set the date to hold the hearing to consider the petition, the court's failure to set the hearing date is not a basis for additional post-conviction relief. The attorney general shall answer the petition for post-conviction relief on behalf of the state. At the request of the attorney general, a prosecuting attorney shall assist the attorney general. The court shall enter written findings of fact and conclusions of law concerning the petition not later than ninety (90) days after the date the hearing concludes. However, if the court determines that the petition is without merit, the court may dismiss the petition within ninety (90) days without conducting a hearing under this subsection.

(j) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The supreme court's review must take into consideration all claims that the:

(1) conviction or sentence was in violation of the:

(A) Constitution of the State of Indiana; or

(B) Constitution of the United States;

(2) sentencing court was without jurisdiction to impose a sentence; and

(3) sentence:

(A) exceeds the maximum sentence authorized by law; or

(B) is otherwise erroneous.

If the supreme court cannot complete its review by the date set by the sentencing court for the defendant's execution under subsection (h), the supreme court shall stay the execution of the death sentence and set a new date to carry out the defendant's execution.

(k) A person who has been sentenced to death and who has completed state post-conviction review proceedings may file a written petition with the supreme court seeking to present new evidence challenging the person's guilt or the appropriateness of the death sentence if the person serves notice on the attorney general. The supreme court shall determine, with or without a hearing, whether the person has presented previously undiscovered evidence that undermines confidence in the conviction or the death sentence. If necessary, the supreme court may remand the case to the trial court for an evidentiary hearing to consider the new evidence and its effect on the person's conviction and death sentence. The supreme court may not make a determination in the person's favor nor make a decision to remand the case to the trial court for an evidentiary hearing without first providing the attorney general with an opportunity to be heard on the matter.

(l) Before a sentence may be imposed under this section, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), must find that:

(1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and

(2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

CREDIT(S)

As added by Acts 1977, P.L.340, SEC.122. Amended by P.L.336-1983, SEC.1; P.L.212-1986, SEC.1; P.L.332-1987, SEC.2; P.L.320-1987, SEC.2; P.L.296-1989, SEC.2; P.L.138-1989, SEC.6; P.L.1-1990, SEC.354; P.L.230-1993, SEC.5; P.L.250-1993, SEC.2; P.L.158-1994, SEC.7; P.L.306-1995, SEC.1; P.L.228-1996, SEC.1; P.L.216-1996, SEC.25; P.L.261-1997, SEC.7; P.L.80-2002, SEC.1; P.L.117-2002, SEC.2 ; P.L.1-2003, SEC.97, eff. July 1, 2002; P.L.147-2003, SEC.1; P.L.1- 2006, SEC.550, eff. Mar. 24, 2006.

HISTORICAL AND STATUTORY NOTES

2007 Electronic Update

2006 Legislation

P.L.1-2006, Sec.550, amended this section by substituting "subsection (l)" for "subsection (k)" in the next-to-last sentence in the introductory paragraph of Subsec. (d).

2004 Main Volume

Acts 1977, P.L.340, Sec.122, eff. Oct. 1, 1977.

P.L.336-1983, Sec.1, eff. June 1, 1983, added Subsec. (b)(10); and made certain corrective changes throughout.

P.L.212-1986, Sec.1, added Subsec. (b)(11).

P.L.320-1987, Sec.2, added Subsec. (a)(12).

P.L.332-1987, Sec.2, added Subsec. (c)(7); and made certain other corrective changes.

P.L.332-1987, Sec.3, provides:

"This act does not apply to a case in which a death sentence has been imposed before September 1, 1987."

P.L.296-1989, Sec.2 rewrote this section which previously read:

"Sec. 9. (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

"(b) The aggravating circumstances are as follows:
"(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.
"(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.
"(3) The defendant committed the murder by lying in wait.
"(4) The defendant who committed the murder was hired to kill.
"(5) The defendant committed the murder by hiring another person to kill.
"(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either:
"(A) the victim was acting in the course of duty; or
"(B) the murder was motivated by an act the victim performed while acting in the course of duty.
"(7) The defendant has been convicted of another murder.
"(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.
"(9) The defendant was under a sentence of life imprisonment at the time of the murder.
"(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty (20) or more years remaining to be served before the earliest possible release date as defined by IC 35-38.

"(11) The defendant dismembered the victim.
"(12) The victim of the murder was less than twelve (12) years of age.

"(c) The mitigating circumstances that may be considered under this section are as follows:

"(1) The defendant has no significant history of prior criminal conduct.
"(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.
"(3) The victim was a participant in, or consented to, the defendant's conduct.
"(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
"(5) The defendant acted under the substantial domination of another person.
"(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
"(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.
"(8) Any other circumstances appropriate for consideration.

"(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

"(1) the aggravating circumstances alleged; or
"(2) any of the mitigating circumstances listed in subsection (c).

"(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

"(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

"(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

"The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

"(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

"(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

"(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

"(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

"(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review."

P.L.296-1989, Sec.3, provides:

"This act does not apply to an offense that is committed before July 1, 1989."

P.L.138-1989, Sec.6, amended the section by making nonsubstantive changes.

P.L.1-1990, Sec.354, emerg. eff. March 20, 1990, made corrective changes in the citations in Subsec. (b)(12).

P.L.250-1993, Sec.2, in Subsec. (b)(6) inserted "probation officer, parole officer, community corrections officer, home detention officer,"; added Subsec. (b)(13); in Subsec. (d) inserted the provision relating to instruction of the jury concerning the statutory penalties for murder and other offenses for which the defendant was convicted, the potential for consecutive and concurrent sentencing, and the availability of good time credit and clemency; rewrote Subsecs. (e) and (g); and added Subsec. (i). Prior to amendment, Subsecs. (e) and (g) read:

"(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

"(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

"(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

"The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

"(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

"(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and
"(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances."

P.L.250-1993, Sec.3, provides:

"IC 35-50-2-3 and IC 35-50-2-9, as amended by this act, only apply to murders committed after June 30, 1993."

P.L.230-1993, Sec.5, added carjacking to the list of offenses in subsec. (b)(1), constituting murder during a carjacking or attempted carjacking an aggravating circumstance.

P.L.158-1994, Sec.7, amended the section by rewriting Subsec. (a); adding a new Subsec. (b)(1)(I) and redesignating former Subsec. (b)(1)(I) as (b)(1)(J); adding Subsec. (b)(14); inserting "Except as provided by IC 35-36-9," in Subsecs. (e) and (g); inserting the third sentence in Subsec. (e)(2); and rewriting Subsec. (i). Prior to amendment, Subsecs. (a) and (i) read:

"(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged."

"(i) To impose a sentence under this section, a jury must find that:

"(1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and
"(2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances."

P.L.306-1995, Sec.1, amended the section by adding Subsecs. (h) and (i); redesignating former Subsecs. (h) and (i) as Subsecs. (j) and (k); deleting "The death sentence may not be executed until the supreme court has completed its review." from the end of Subsec. (j); and adding everything in Subsec. (j) beginning with the third sentence.

P.L.216-1996, Sec.25, amended the section by inserting the concluding sentence in Subsec. (e).

P.L.228-1996, Sec.1, amended the section by adding Subsec. (b)(11); and redesignating former Subsecs. (b)(11) through (b)(14) as Subsecs. (b)(12) through (b)(15), respectively.

P.L.228-1996, Sec.2, provides:

"This act applies to crimes committed after June 30, 1996."

1997 Legislation

P.L.261-1997, Sec.7, emerg. eff. retroactive to July 1, 1997, added Subsec. (b)(16).

P.L.261-1997, Sec.8, emerg. eff. July 1, 1997, provides:

"IC 35-41-1-25, IC 35-42-1-1, IC 35-42-1-3, IC 35-42-1-4, IC 35- 42-2-1.5, and IC 35-50-2-9, as amended by this

act, apply to offenses committed after June 30, 1997."

Governor's veto of P.L.261-1997 of the 1997 Regular Session was overridden by the General Assembly on Jan. 22, 1998.

2002 Legislation

P.L.80-2002, Sec.1, emerg. eff. March 20, 2002, amended this section by substituting the last three sentences in the concluding paragraph of Subsec. (e) for the former last sentence, which read: "In making the final determination of the sentence after the jury's recommendation, the court may receive evidence of the crime's impact on members of the victim's family".

P.L.80-2002, Sec.2, emerg. eff. March 20, 2002, provides:

"IC 35-50-2-9, as amended by this act, applies only to a conviction for murder that occurs after the effective date of this act, including a conviction entered as a result of a retrial of a person, regardless of when the offense occurred."

P.L.117-2002, Sec.2, amended this section by inserting the next-to-last sentence in the introductory paragraph of Subsec. (d); and adding "For a defendant sentenced after June 30, 2002," at the beginning of the first sentence in the introductory paragraph, and substituting the present first full sentence for the former first two full sentences in the concluding paragraph, which read: "The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider" and "The court is not bound by the jury's recommendation", respectively, in Subsec. (e).

2003 Legislation

P.L.1-2003, Sec.97, emerg. eff. retroactive to July 1, 2002, amended this section by inserting Subsec. (j)(3)(B).

P.L.147-2003, Sec.1, amended this section by adding new Subsec. (k); by redesignating former Subsec. (k) as new Subsec. (l); and by replacing internal references within the section to Subsec. (k) with references to Subsec. (l).

Formerly:

IC 35-13-4-1.
IC 35-21-4-3.
Acts 1941, P.L.148, s.1.

Acts 1971, P.L.454, SEC.1.
Acts 1971, P.L.461, SEC.3.
Acts 1973, P.L.328, SEC.1.

CROSS REFERENCES

Aggravating or mitigating circumstances see section 35-38-1-7.1.

Appeals, death penalty, see IC 35-38-4-6.

Bail upon appeal prohibited for defendant convicted of murder, see IC 35-33- 9-1.

Cruel or unusual punishment, see Const. Art. 1, § 16.

Death penalty, generally, see IC 35-38-6-1 et seq.